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## ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY

# ADVISORY

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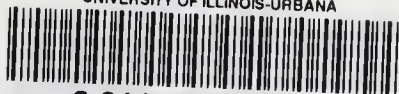
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# THE FOIA: HOW IT AFFECTS CRIMINAL JUSTICE AGENCIES

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## What is the FOIA?

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### ILLINOIS DOCUMENTS

The Illinois Freedom of Information Act (FOIA) is a new law designed to provide the people of Illinois with access to full and complete information regarding the affairs of government and the official acts and policies of public officials.

The Act can be described by its three basic assumptions: 1) All bodies that receive or spend tax revenues are *public bodies*; 2) Records of public bodies are *public records*; and 3) Public records shall be made available to anyone who requests them. Within this broad framework, the FOIA defines the administrative requirements for complying with the Act and spells out specific exemptions from the law.

The idea of public access to government records is not new to Illinois or the United States. There has been a federal FOIA since 1966, and every state now has some form of an information act. Illinois has had a state records act for more than 20 years.

But while widespread access to public records is fundamental to our constitutional form of government, some information may be too sensitive for public dissemination. Many criminal justice administrators, for example may be concerned that releasing certain investigative information may not only hamper agency effectiveness, but may even jeopardize employee and public safety. The FOIA takes these issues into account in balancing the interests of both citizens and public officials. The Act contains an extensive list of exemptions which allow certain information, including some criminal justice data, to be withheld from the public.

Although the law creates more administrative paperwork, the procedures for complying with it are spelled out in a simplified manner and can be easily satisfied. A conscientious administrator should have no problem conforming with the mandates of the FOIA, while at the same time protecting legitimately confidential records.

The Illinois Freedom of Information Act (P.A. 83-1013) was signed into law on December 27, 1983, and takes effect on July 1, 1984. After July 1, all "public bodies" in Illinois--including every local, county, and state criminal justice agency--must comply with the Act's procedural and administrative requirements.

Several elements of the new law are of special concern to criminal justice agencies. The Illinois Criminal Justice Information Authority, as the state agency responsible for criminal justice information policy, is ready to help local agencies understand and implement the FOIA. This advisory is part of that effort.

Keep in mind that the material presented here is not intended to replace a careful reading of the FOIA, nor will it explain in detail all the administrative procedures required by the Act. Rather, this advisory focuses on those FOIA issues that are of particular concern to criminal justice agencies.

Criminal justice officials with specific questions about the FOIA can call the Authority for assistance. The telephone number is (312) 793-8550.

## Administrative requirements.

The administrative tasks necessary to comply with the FOIA can be broken down into four general activities. Each agency must:

- 1) Develop rules and regulations for complying with the FOIA;
- 2) Display and distribute on request certain information about the agency organizational structure and FOIA procedures;
- 3) Maintain a list of the types of records available; and
- 4) Prepare the forms and files necessary to process requests.

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The FOIA does not specifically direct how an agency is to satisfy the Act's procedural requirements. Rather, the FOIA defines what must be accomplished, and allows each agency to establish its own methods.

There are five FOIA sections that outline the Act's administrative requirements. Section 3 discusses time limits and response procedures. Section 4 describes what must be posted and distributed. Record categorizing and listing are addressed in Section 5; allowable fees are included in Section 6. Section 9 tells how to deny a request, and Section 10 shows how a requester can appeal a denial.

When viewed together, these sections give a working structure for an agency's implementation of the FOIA. If clear-cut rules and procedures are established before the first request is received, an agency should have no difficulty complying with the Act.

## Are there exemptions?

The FOIA contains 26 specific exemptions (Section 7). Any record that falls within one of these categories is exempt from the inspection and copying requirements of the Act.

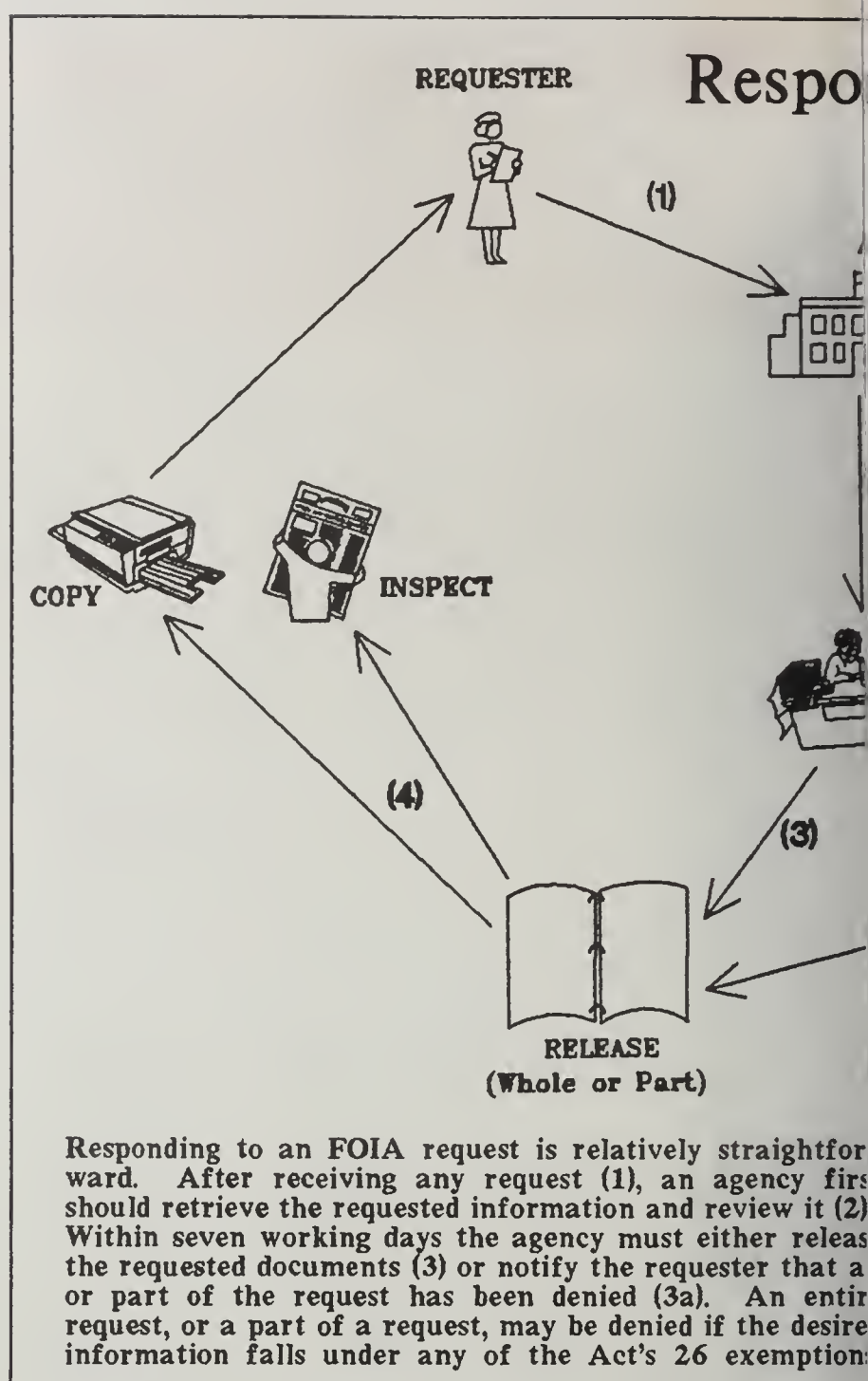
In other words, if a request is made for certain information and the information falls within an exempt category, an agency is legally empowered to deny the request. There is an official procedure for the denial, but the practical outcome is that the record may be kept confidential.

Exemptions cover everything from library circulation records to scoring keys for academic testing. Not all of the exemptions apply to criminal justice agencies, but there are many relevant sections. In most cases, when there is a legitimate need to keep something private, the act contains an appropriate exemption.

The FOIA is somewhat ambiguous as to whether an agency can *release* exempt records. According to the Act, the records listed in Section 7 "...shall be exempt from inspection and copying." This statement indicates that for the types of records listed, the inspection and copying requirements of the Act do not apply. However, the statement does not appear to *prohibit* release, even if the record is "exempt."

The intent of the FOIA clearly is to encourage dissemination of public information, not to constrict it. This indicates that the exemption section can be read as allowing a record to be withheld, but not demanding that it be.

Nevertheless, other exemption sections contain additional requirements that **MUST** be met before that type of record can be released. The personal privacy section (Section 7 [b]) is a good example of this restriction. Records containing certain personal information are exempt from inspection and copying. Even if an agency wanted to waive the exemption and release such a document, it could not do so without the written consent of the subject of the record (Section 7 [b]).



Responding to an FOIA request is relatively straightforward. After receiving any request (1), an agency first should retrieve the requested information and review it (2). Within seven working days the agency must either release the requested documents (3) or notify the requester that all or part of the request has been denied (3a). An entire request, or a part of a request, may be denied if the desired information falls under any of the Act's 26 exemptions.

Whenever an agency considers releasing a record that falls in an exempt category, the agency should make sure that all exemption requirements are met and that other laws do not apply.

## What records are affected?

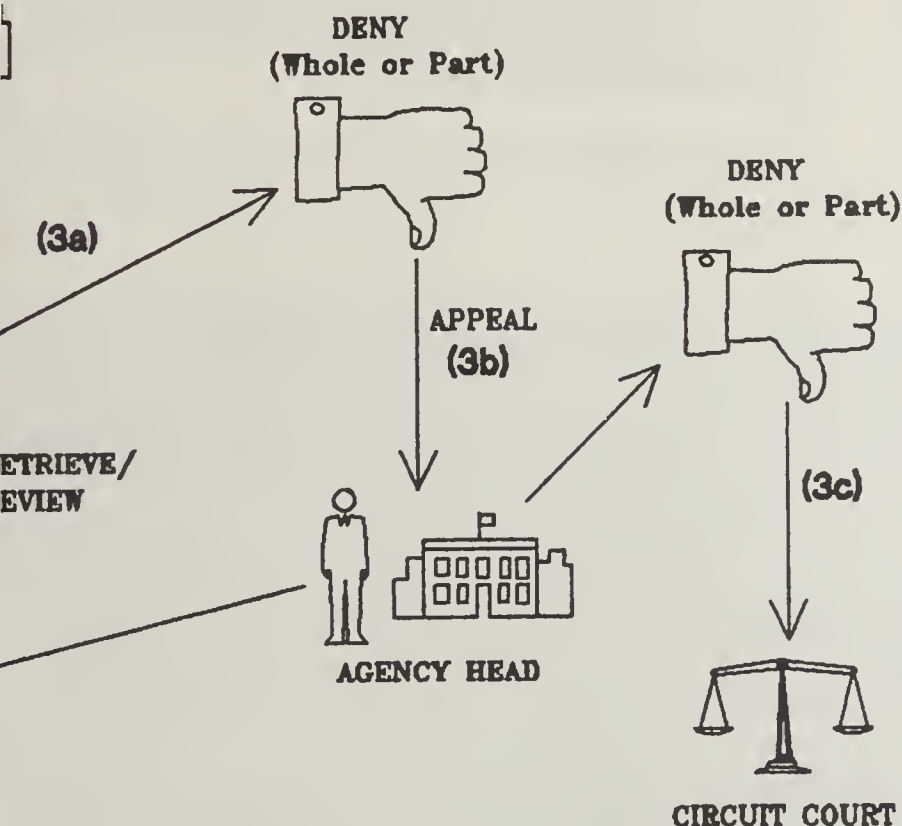
For the purpose of understanding the FOIA, records of a criminal justice agency can be divided into three general categories--*administration, detection/investigation, and criminal history*. The FOIA affects each of these types of records differently.

**Administration records.** Administration records, as used here, are the basic day-to-day business records of an agency. For instance, the maintenance costs for agency vehicles are administration records, as is a list of employees and their salaries.

With respect to these types of records, a criminal justice agency is no different than any other public body. With only a few specific exceptions, the majority of these records are open to the public.

# ing to an FOIA Request

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several of which apply specifically to criminal justice agencies. For any denial, the requester has the right to appeal to the agency head (3b); if dissatisfied with that decision, the requester can then file suit in Circuit Court (3c). Releasing information may involve either copying the requested documents or making them available for inspection (4). An agency cannot charge the requester for retrieving any data, although a copying fee is allowed.

**Detection/investigation records.** Records that deal with the detection and investigation of crime receive special treatment under the FOIA. A separate exemption addressing the sensitive nature of this type of information is included in the Act (*Section 7 [e]*).

The detection and investigation paragraph of the FOIA will probably be the exemption most applicable for criminal justice purposes. It allows all law enforcement records "related to the detection and investigation of crime" to be kept confidential. Governor Thompson, through an amendatory veto, specifically modified the original wording of this paragraph to make it a comprehensive, rather than a limited, exemption.

The paragraph sets no limit on the phrase "related to," nor does it define detection and investigation. However, keep in mind that the Act as a whole emphasizes broad access and limited exemptions. The courts are also likely to view it that way. In other words, an agency should not rely on the Act's exemptions just to avoid paperwork.

For example, assume a police department receives a request for a list of its vehicles, the fuel

bill for each, and data on how they are deployed on Thursday nights. An argument could be made that all three parts of the request are related to "detection and investigation." However, the information that may be important to keep confidential is the locations of the squad cars at any particular time. If that information were released to the wrong persons, there could be a disastrous effect on the agency's ability to detect and investigate crime. Therefore, there would be a legitimate reason for withholding the deployment information, but the other requested vehicle records should be released.

**Criminal history records.** Criminal history records ("rap sheets" and equivalent documents summarizing an individual's arrest/conviction record) are covered by two different sections of the FOIA. First, there is an exemption that refers specifically to such records (*Section 7 [d]*). Second, criminal histories maintained by the Illinois Department of Law Enforcement (DLE) are indirectly excluded from the Act by existing law (which remains unaffected by the FOIA).

State criminal history records are controlled by *Ill. Rev. Stat. Chap. 38, par. 206-1 to 206-8*. This statute holds that criminal history records maintained by DLE are not to be made public. Since the FOIA does not affect existing law, that policy still holds true.

In addition, locally-kept criminal history records need not be disclosed under the FOIA (*Section 7 [d]*). However, "arrest blotter" information (any chronologically-maintained listing of arrests and persons in custody) remains public. Likewise, individuals may demand to see their own criminal history records, if doing so does not endanger others. (For example, a person could not review any portion of his rap sheet that contains information about informants or other persons involved in an arrest.)

If both the FOIA and another law apply to the same records, the FOIA defers to the other law (*Section 1* and *Section 7 [a]*). Therefore, compliance with the FOIA does not automatically guarantee that a criminal justice agency has conformed with state and federal laws regarding release of some records.

Finally, the Authority has proposed a comprehensive Criminal History Record Information (CHRI) Act to the Illinois General Assembly. If this Act or similar legislation is passed, there will be some changes in the way criminal history records are handled. The Authority will supply information on the status of the CHRI Act and how it affects criminal justice agencies.

## What about burdensome requests?

Remember, the FOIA does not require justification for a request, nor does it allow an agency to question the purpose of the request. While this may cause an agency to envision endless hours of staff time committed to answering open-ended, trivial requests, the FOIA has anticipated such situations. The Act contains a paragraph on handling "unduly burdensome" requests (*Section 3 [f]*).



If a request for a category of records is so broad that "the burden on the public body outweighs the public interest in the information," the request may be denied. Before denying the request, however, the agency must work with the requester to try to better define the information being sought.

Because the Illinois FOIA is a new law, it is difficult to say exactly what is *unduly burdensome*. There is no Illinois case law defining the application of the FOIA. However, the Illinois FOIA parallels the federal statute, and Illinois courts likely will look to the federal experience for guidance. The federal courts generally have favored broad disclosure and limited exceptions.

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## How are requests denied?

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When it is determined that certain requested records are legitimately confidential, and that the FOIA exempts them from disclosure, the request may be denied. Denial of a request is basically a two-step procedure.

First, the agency must notify the requester within seven days, and explain why the request was denied and who was responsible for the decision. This notification must be in writing and must give the name and title/position of the decision maker. The denial notice also must explain appeal procedures.

Second, every denial can be appealed to the "head" of an agency. When a person makes an appeal, the agency head reviews the denial and either agrees with it or overrules it. If the denial stands, the requester may go outside the agency and file suit in the state Circuit Court.

In some situations, requested documents will contain a mix of both exempt and nonexempt material. For these types of records, an agency still must make available the nonexempt portion.

For example, suppose a request is received for equipment maintenance reports, but one of the reports refers to an undercover surveillance operation. The undercover operation is exempt from disclosure (*detection/investigation records*); however, the maintenance information is not. The exempt material must be deleted and the rest of the document released.

Deleting exempt material can be done by physically blacking out the appropriate portions, or by any other method that allows the nonexempt material to be released. The process may be awkward and time consuming, but the law requires it be done (*Section 8*). Federal courts have favored this "strike-out" approach, and Illinois courts likely will follow their lead.

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## Common request situations.

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It is impossible to anticipate all types of requests possible under the FOIA. Each request must be evaluated individually, with a firm understanding of the duties and limitations defined by the Act. The following examples help illustrate how the FOIA can be applied.

**Confidential informants.** There is an obvious need to protect the identities of confidential informants. Disclosing an informant's name could destroy an investigation network and cause harm to the individual. Even the hint of possible disclosure could discourage other individuals from coming forward with information.

While informants' identities probably are protected by the detection/investigation paragraph (*Section 7 [e]*), they are specifically and unambiguously exempt from disclosure by the section on personal privacy (*Section 7 [b] [v]*). The FOIA in no way requires release of any informant's identity.

The subparagraph referring to informants ("*persons who...provide information to...*") uses the language "information revealing the identity..." (*Section 7 [b] [v]*). This wording indicates that more than just the informant's name may be withheld. For example, if a series of documents refers to a short, thin, drug informant being at certain places at certain times, but never mentions his name, the references still may be exempt from disclosure. If any information, regardless of what form it takes, can be used to identify an informant, that information is exempt.

**Complainants and victims.** The identities of "persons who file complaints with...law enforcement or penal agencies" also are protected from disclosure (*Section 7 [b] [v]*). This paragraph seems to apply to a broad, general use of the term "*complaint*," and includes both official charging documents and informal notifications.

This exemption may be applicable in several situations. Suppose an irate homeowner demands a list of persons who have complained about his barking dog. To release that information could endanger the complaining parties and discourage others from making legitimate reports. The request may be denied.

Several FOIA exemptions also protect the identities of crime victims. Their identities relate to detection and investigation of crime (*Section 7 [e]*); they are a complaining party (*Section 7 [b] [v]*); and they are providing information to a law enforcement agency (*Section 7 [b] [v]*).

**Media requesters.** Media representatives have no greater or lesser rights than other citizens regarding access to public records or the manner or time in which requests are responded to. Under the FOIA, requests from newsmen are no different than requests from anyone else. The same time limits and exemptions apply.

**Requests from community groups and organizations.** Again, the same general rules apply no matter who makes an FOIA request. However, community organizations may tend to make a type of request that deserves special comment here.

Assume a parents' group wants to know how many arrests were made at a local nightclub during the last six months. Several sections of the Act may apply.

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Chronological arrest logs or blotters are not exempt and should be released (*Section 7 [d] [i]*). An agency, however, would not be required to spend time identifying the specifics of each arrest. Rather, the agency is required to disclose only the blotter information it has, in whatever form the record is maintained (if, in fact, it is maintained).

Arrest reports, case reports, and other supplemental material concerning arrests at the nightclub may fall under the detection/investigation exemption (*Section 7 [e]*). Also, names of witnesses and complainants may be withheld (*Section 7 [b] [v]*).

Portions of other documents associated with the arrests at the club may constitute criminal history record information (CHRI) as defined at the end of *Section 7 (d)*. The limitations and requirements associated with CHRI would then apply to those parts of the documents (see discussion of criminal history records on p. 3).

This example illustrates how several different sections of the Act may affect portions of the same request.

**Protecting agency staff.** Another important concern is protecting the privacy and safety of agency staff. An agency may have information about an employee's home, family, and background that could be used to harass and threaten that person.

The FOIA states that "information that bears on the public duties of public employees" must be released. However, if the information is purely personal, then it is exempt (*Section 7 [b]*).

For example, suppose someone requests an employee's home address, the names of family members, and the person's law enforcement training background. Because the home address and family names have no bearing on the person's public duties, that information may be withheld. However, a list of law enforcement training academies attended and programs completed is relevant to the person's work-related qualifications, and therefore should be released.

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## Correctional facilities' records.

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Besides these more general FOIA concerns for criminal justice agencies, some provisions of the Act directly affect correctional facilities.

Records that relate to the security and operation of correctional institutions are exempt from disclosure under the Act (*Section 7 [e]*). The FOIA does not define "correctional agencies" or "correctional institutions." However, the context seems to indicate that a correctional institution is any agency empowered to hold persons in custody, and covers both state and local facilities, including police department lock-ups.

The phrase *security and operation* gives a very broad meaning to this exemption. Strictly security-related records, such as the location and type of locks used, can be kept confidential. The exemption also seems to include operations information such as shift rotations.

Building plans also are exempt from the FOIA (*Section 7 [k]*). Any correctional agency, concerned with the possibility of escape attempts or terrorist attacks, may wish to deny a request for blueprints of its institution. Under this exemption, a denial is allowed.

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## Miscellaneous concerns.

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\* *Section 3 (a)* of the FOIA states that an agency shall "make available" public records, but does not describe the precise procedures for doing so. In sections of the Act where procedural requirements are defined, the Act always refers to **WRITTEN REQUESTS** only. From this it can be inferred that the intent of the Act is not to disallow oral requests, but that the full administrative demands of the FOIA apply only to written requests.

\* Whenever an agency fails to respond to a request, or does not respond in the form required by the FOIA, that action is automatically considered a denial. Appeal procedures would then apply.

\* When a request is answered in part, but some exempt material is deleted, the response is considered a denial of the deleted material. The denial procedures must be followed for the portion deleted.

\* The FOIA does not require an agency to create new types of records or maintain its records in a different manner. It merely makes records that already exist open to the public (*Section 1*). Similarly, agencies do not have to collate, summarize, or statistically manipulate data for a requester; only raw data must be made available for inspection and copying.

\* Be aware that other laws and regulations, including state and local records acts, regulate the storage and destruction of records. Do not destroy records without following state or local record commission guidelines.

\* Manuals and instructions related to criminal investigations are exempt from the Act (*Section 7 [z]*). This exemption, for instance, would allow an agency to keep confidential its manuals on the placement, and operation of radar equipment. However, administrative manuals and instructions are not exempt (*e.g.*, a manual on employee grievance procedures).

\* The Act allows agencies to charge fees for reproducing and certifying requested documents. These fees are limited to the actual reproduction and certification costs; the agency's internal cost to locate and retrieve the requested records are not reimbursable. Imposing excessive fees for a request constitutes a denial of that request, and appeal procedures would apply.

\* A written request for records must be responded to in seven working days. That period can be extended, under certain circumstances, for an additional seven working days. Likewise, an agency head must respond to an appeal within seven working days of receipt of the appeal.

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## The Authority can help.

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After July 1, 1984, all local, county, and state criminal justice agencies in Illinois--as well as all other public bodies in the state--must respond to requests for agency records under guidelines established by the FOIA. If an agency starts now and establishes simple, clear-cut procedures for processing requests, it should have no problem operating under the FOIA.

As the state agency created to "encourage the improvement of criminal justice agency procedures and practices with respect to information," the Authority will help criminal justice agencies in Illinois understand and implement the FOIA.

Authority staff are prepared to answer specific technical questions regarding criminal justice elements of the Act. While the Authority's recommendations in this area are not equivalent to an official ruling from the Illinois Attorney General, the agency can help address specific policy issues related to the FOIA.

In addition, the Authority will serve as a clearinghouse for information about FOIA issues affecting criminal justice agencies. As additional, more specific topics arise, the Authority will publish advisories to address them as well.

Criminal justice officials with questions about the FOIA should call the Authority at (312) 793-8550.

## Other FOIA Publications

Following is a list of other useful publications on the Illinois Freedom of Information Act. Copies of these publications can be obtained from the sources listed.

### Illinois Freedom of Information Act Neil F. Hartigan, Attorney General

*Summarizes the Act, and addresses important procedural issues using a question-and-answer format. Also contains a complete copy of the Act.*

### Illinois Freedom of Information Act Reference Manual George H. Ryan, Lieutenant Governor

*Details the Act topic by topic. Also has an extensive appendix that contains step-by-step procedures for complying with the FOIA. Complete copy of the Act included as well.*

### A Municipal Officials' Guide to the Freedom of Information Act Illinois Municipal League

*Describes how the FOIA affects municipal public bodies.*

### The New Illinois Freedom of Information Act Administrative Law, April 1984 (vol. 13, no. 9) Illinois State Bar Association

*Contains a brief summary of the Act, and describes various implementation requirements.*



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